Lai Kwee Lan & Anor v Ng Yew Lay & Anor

HIGH COURT (SINGAPORE) — SUIT NO 6742 OF 1984
CHAN SEK KEONG J
6 SEPTEMBER 1989

Contract — Undue influence — Whether evidentiary presumption of such arises between brothers — Non est factum — Transferor of shares not understanding English — Reliance on transferee for English translation and interpretation — Evidence Act (Cap 97, 1985 Ed), s 113

Equity — Shares transferred in non est factum situation — Transferee holding on resulting or constructive trust — Undue Influence

Evidence — Undue influence, presumption of — Whether applicable between brothers — Evidence Act (Cap 97, 1985 Ed), s 113

Companies and Corporations — Shares, valuation of

This was a claim by the plaintiffs, as personal representatives of the estate of the deceased, for the return of 50,000 shares ('the shares') in the deceased's company ('the company') which the first defendant is alleged to have wrongfully acquired from the deceased shortly before the latter's death. The first defendant was the brother of the deceased and the first plaintiff was the widow of the deceased. The deceased was the managing director of the company and all decisions relating to the company were made by him alone. However, since he knew no English, he relied on the first defendant for assistance in translation and interpretation. At the time of the alleged transfer, the deceased was in hospital suffering from a terminal disease. The first defendant claimed that the shares had been sold to him for $50,000. The plaintiffs denied that this was the case. They claimed that the deceased was incapable of consenting to the transfer and that the first defendant knew this. The plaintiffs argued that the circumstance of the alleged transfer and the fact that the deceased relied on his brother to prepare documents in English should lead the court to draw the inference that the first defendant did not acquire the shares in good faith. It was also argued that s 113 of the Evidence Act (Cap 97, 1985 Ed) shifted the burden to the first defendant to prove the good faith of the transaction.

Held, allowing the plaintiffs' claim:

(1) The fixed assets alone of the company had a total value of $199,000 at cost. This means that each share was worth $1.99 without taking into account other factors like the fact that the shares represented a controlling block and the company was carrying on a viable business.

(2) Also, the fixed assets included the company's freehold property which was carried in its books at about $78,000 but which was mortgaged to a bank to secure banking facilities of $80,000. Having regard to the margin generally imposed by banks when taking immovable property as security, the property was worth much more than the book value.

(3) The total value of jobs in progress at the time of the deceased's death was $4,777,997. The company also had sufficient goodwill and manpower to carry on the business and one of the deceased's brothers was in a position to keep the business going. The company was successful in obtaining jobs worth $2,675,379 after the deceased's death.

(4) From the above reasons, the court had no doubt that the shares at the date of the alleged transfer were more than $50,000 and that their potential value was many times that amount. The Commissioner of Estate Duty had valued them at $1.88 each.

(5) The general rule is he who asserts must prove the assertion. However, s 113 of the Evidence Act (Cap 97, 1985 Ed) reverses this burden where one party is in a position of active confidence to the other. This section is no more that a restatement of the principle in equity which applies to every case where influence is acquired and abused, where confidence is reposed and betrayed. In such cases, equity presumes undue influence until the contrary is shown.

(6) There are certain personal relationships which equity regards as giving rise to the presumption of undue influence because one party is deemed to be in a position of dominance vis-a-vis the other.

(7) Equity does not presume that a brother is in a confidential position to and therefore has undue influence over another sibling, not even an elder brother to a younger brother. But such a relationship may exist as a fact in a particular relationship.

(8) The court was unable to find that the first defendant was in a position of active confidence vis-a-vis the deceased. The deceased was able to exercise his judgment independently and gave instructions for the making of his will. Section 113 thus did not apply and the burden of proof remained with the plaintiffs.

(9) The mere fact that the deceased was compos mentis when he signed the various documents or when he was alleged to have done so does not necessarily reflect a conscious or knowledgeable state of mind when he signed them so as to make the documents valid in the eyes of the law.

(10) If the deceased had been misled as to the nature of the documents that he was asked to sign, he could plead non est factum.

(11) If the deceased were alive and had commenced proceedings to set aside the transfer of shares on the ground of non est factum, he would have to prove that he did not know what sort of document he was signing. This burden would not be shifted to the first defendant merely because of the deceased's death.

(12) On the evidence, the court was wholly satisfied that the plaintiffs had discharged the burden of proving that there was never a sale of shares to the first defendant. On the evidence as a whole, the probability that the deceased did not know the nature of the document that he was signing is much higher than the probability of his having been aware of it.

(13) For the above reasons, the plaintiffs succeeded in their claim. There would be a declaration that the shares are held by the first defendant for the estate of the deceased by way of resulting or constructive trust and an order that the proceeds of realization of the shares be paid to the plaintiffs and that the first defendant account to the plaintiffs for all profits which he has derived from the wrongful ownership of the shares.

Case referred to

1 *Smith* v *Kay* (1859) 7 HL Cas 750; 11 ER 299 (refd)

Legislation referred to

Evidence Act (Cap 97, 1985 Ed) s 113

G Murugaiyan for the plaintiffs.
M Karthigesu (PC Tock with him) for the first defendant.
Goh Soon Hock for the second defendant.

Cur Adv Vult

Chan Sek Keong J: This is a claim by the plaintiffs as the personal representatives of the estate of Ng Yue Chee for the return of 50,000 shares ('the shares') in the capital of Ng Yu Chee Pte Ltd ('the company') which the first defendant ('NYL') is alleged to have wrongfully acquired from Ng Yue Chee ('NYC') a short time before NYC's death.

The first plaintiff ('LKL') is the widow of NYC and NYL is the elder brother of NYC. NYC had one younger brother, Ng Yew Leong, and two sisters, Ng Bee Keow ('NBK') and Ng Ah Khiow ('NAK'). He also left two children, a son, Ng Hock Sun (then aged 16) and a daughter, Ng Seok Joo (then aged 14).

NYC was a plumbing and sanitary works contractor. He started the business in 1969 as a sole proprietor until 1975 when the company was set up with the assistance and also the advice of NYL and one Lee Soh Hab ('Lee') who was a company secretary and NYL's friend. It was NYL who introduced Lee to NYC. NYC was Chinese-educated and did not read or speak English whilst NYL was passably proficient in English. NYL also had some knowledge of book-keeping and in the evenings or at weekends he helped NYC in writing up the account books of the sole proprietorship. NYL was then working as a salesman in a tobacco company and remained as such at the time of NYC's death.

The subscribers and first directors of the company were NYC and LKL. NYC was appointed the managing director of the company and remained as such until his death. Lee was appointed the secretary and remained as such until the company was wound up. In December 1976, the first allotments of shares in the company as paid-up shares were made as follows: NYC (7,999) LKL (3,999) NAK (4,000) NBK (2,000) NYL (2,000) and Ng Yew Leong (2,000). These were gift shares from NYC, as were subsequent allotments of shares in the company. In August 1977, NYL, NBK, NAK, and Ng Yew Leong were appointed as directors of the company by a directors' resolution which at the same time authorized payment of directors' fees to NYC and LKL and 'transport allowances' to the brothers and sisters. NYC also received remuneration as the managing director.

According to the company's records, annual directors' fees and remuneration of various amounts were approved by the general meeting for payment to each of the directors of the company, except for the year of 1978 when only directors' fees were approved. No directors' remuneration was approved in favour of NYL during the period when he was not a working director.

The company was in the absolute control of NYC. All shareholders' and directors' meetings during his tenure as managing director were paper meetings except the time when he was in hospital. All company and directors' decisions relating to the affairs of the company were made by NYC alone and they included all further allotments of shares to the shareholders, the payment annually of directors' fees and remuneration and the sort of jobs the company should tender for. Because he knew no English, he had to rely on NYL to convey his decisions and instructions on company matters to Lee in order that their implementation be recorded in English. It is not disputed by NYL that NYC relied on NYL entirely in these matters. After the documents have been prepared in English, NYL would translate the contents thereof to NYC.

I turn now to the financial condition of the company at the time of NYC's death. The one set of audited accounts of the company for the year ending December 1982 that was produced in evidence showed that the company:

(1) made (a) in 1981, a loss of $27,419 on a turnover of $1,617,740 after charging $96,800 for directors' fees and remuneration; and (b) in 1982, a profit of $14,210 on a turnover of $2,449,708 after charging $88,000 for directors' fees and remuneration;

(2) had in 1981 and 1982 respectively, fixed assets at cost of $199,454 and $199,796;

(3) a paid-up share capital of 100,000 shares of $1 each, owned as follows: NYC — 50,000; LKL — 11,000; NAK — 11,000; NYL — 10,000; NBK— 9,000 and Ng Yew Leong — 9,000.

The shareholding of NYC as set out in the said accounts was admitted by Lee to be incorrect as NYC's 50,000 shares had already been transferred to NYL by the end of April 1982. Lee was unable to offer an explanation for the mistake.

I should at this stage of the summary of the facts make a few observations as to the value of the shares at the date of the alleged sale. Both NYL and Lee have testified that in their opinions the accounts showed that the shares were worth about par value in March 1982 and also that the company was not profitable, and that he, NYL, was doing NYC a favour in buying NYC's shares. In my view, these opinions were not substantiated by any evidence except that the company had made a profit of $1,450 which reduced the accumulated loss to $25,969 for 1981. My first observation is that the fixed assets alone had a total value of about $199,000 at cost. This means that the value of each share was worth about $1.99, without taking into account any other factors, eg that the shares represented a controlling block, or that the company was carrying on a viable business. Even if the accumulated loss of $25,969 were taken into account, the shares would still be worth $1.63. Secondly, the fixed assets included the company's freehold property in Geylang which was carried in its books at cost at about $78,000 and which was mortgaged to a bank to secure banking facilities of $80,000. Although

no evidence of the market value of this property was adduced before me, I think there can hardly be any doubt that, having regard to the margin generally imposed by banks in Singapore when taking immovable property as security, the property was worth much more than $78,000. Thirdly, the total value of jobs in progress at the time of NYC's death was $4,777,997. Fourthly, the company had sufficient goodwill and manpower to carry on business as Ng Yew Leong was alive and in a position to keep the business going. In fact, the company was successful in obtaining jobs to the value of $2,675,379 after NYC's death. These jobs eventually enabled the company to realize the total sum of about $1.4m from its assets when it went into liquidation. For these reasons, I have no doubt whatever that the fair value of the shares at the date of the alleged transfer was more than $50,000 and that their potential value was many times that amount. In my view, NYL could not have been aware of these facts since he assisted in writing up the books of the company and had full access to them. I should add that the Commissioner of Estate Duty valued the shares at $1.88 each.

In early 1982, NYC's health was failing. He was admitted to Gleneagles Hospital at the end of February 1982 for a few days. He was discharged in the morning of 4 March and was admitted to the Singapore General Hospital in the evening of the same day. He went for a liver angiogram on 8 March. A liver biopsy was done on 19 March which showed that he had inoperable cancer of the liver. He developed an infection of the right hand, septicaemia and liver failure. He was on drips after the exploratory operation. He requested to be and was discharged on 21 April so that he could live his last days at home. He died on 17 May 1982.

In regard to his personal affairs, NYC made a will on 15 March 1982, whilst he was in hospital. The will was drafted by a solicitor and its execution was witnessed by the said solicitor and the second plaintiff. During one of his visits to the hospital on 12 March, the latter was requested by NYC to act as an executor and trustee. The other executrix and trustee was LKL. By his will, NYC gave all his property to LKL and the two children. The will, which was a simple will, made no mention of the shares.

After the death of NYC, the company continued with its business. According to the documents produced by NYL, the bank renewed its banking facility on 5 August 1982 and three of the directors, viz NYL, NBK, and Ng Yew Leong, passed a resolution approving it. On 14 October 1982, the same three directors adopted the audited accounts of the company for 1981 and also resolved the payment of directors' fees and remuneration. The annual general meeting of the company was also held on 27 October 1982 to adopt the accounts and the directors' fees and remuneration. On 9 December 1983, the same three directors approved the audited accounts of the company for 1982, the payment of directors' fees and remuneration and also directors' bonuses to themselves. The annual general meeting held on 24 January 1984 adopted the audited accounts and the payment of the directors' fees, remuneration and bonuses. Then on 10 March 1984, a directors' meeting at which NYL and Ng Yew Leong were present disapproved the appointment of office-bearers but approved the winding up of the company after the completion of all its outstanding works. Neither LKL nor NAK appeared to have participated in any of the proceedings evidenced by these resolutions.

LKL testified she had no knowledge of where the certificates of the shares were kept before and after the death of NYC. On 11 November 1982, the second plaintiff wrote to the company inquiring as to the number of shares held by NYC at his death and the value of such shares for the purpose of filing an estate duty affidavit. A copy of the letter was sent to SH Chan & Associates ('SHCA'), a firm of tax consultants acting for the plaintiffs. The company did not reply to this letter. On 14 January 1983, SHCA wrote to the company to request the same information. On 7 March 1983, SHCA sent a reminder. On 18 March 1983, a reply came from the solicitors PC Tock & Co ('PCT') acting for the company. The said reply was that NYC owned no shares in the company at the time of his death, and that he had on 25 March 1982 transferred the shares to NYL for the consideration of $50,000. The letter enclosed a copy of the transfer dated 25 March 1982 ('the transfer'). The transfer was in the usual form used by listed companies in Singapore and had to be executed under seal and witnessed. The transfer had on it the name of NYC as transferor and the name of NYL as transferee. It had on it the alleged signature of NYC in two places, one as transferor and the other a certificate that the name of the transferee had been filled in prior to execution by the parties. Neither the signature of NYC nor that of NYL was witnessed by any person. Nor was there on the transfer any indication that the execution had been made under seal.

On 26 May 1983, the solicitors for the plaintiffs, Loganathan & Co ('L&C'), wrote to PCT to furnish proof of payment of the sum of $50,000. There was no reply and a reminder was sent on 4 August 1983. The reply from PCT came on 24 January 1984, and it was that NYL had paid the consideration of $50,000 in two instalments: one of $30,000 on 8 March 1982 and the other of $20,000 on 15 March 1982. NYL has not been able to explain why it took PCT such a long time to furnish information on something which was then within his personal knowledge. On 16 February 1984, L&C wrote to PCT denying the transfer and requesting the return of the share certificates held by NYL. On 1 March 1984, PCT replied that the transfer of the shares had been approved by the directors of the company and effected accordingly. On 21 March

1984, L&C replied to say that the consideration of $50,000 was never received by NYC or any member of his family. The present action was commenced on 27 September 1984.

The basis of the plaintiffs' claim is set out in para 6 of the re-amended statement of claim which reads as follows:

> The plaintiffs contend that the first defendant had forged and/or obtained the signature of the deceased on the transfer form fraudulently in that he knew or ought to have known that the deceased was incapable of consenting or agreeing to the alleged sale and without the knowledge of the first plaintiff or any other independent witness; alternatively, that the first defendant had acquired the said 50,000 shares belonging to the deceased without paying a single cent for the shares which were worth more than $2 each.

The defence was a denial of the plaintiffs' allegations and an assertion of a genuine and bona fide sale and purchase and payment of $50,000.

At the opening of the trial, the allegation of forgery was withdrawn as the plaintiffs were unable to adduce any evidence that the signatures of NYC on the transfer were forged. The testimonies of the plaintiffs' and of NYC's son and NBK added up to one thing. They all knew nothing about the sale and the transfer of the shares to NYL until PCT replied to that effect on 18 March 1983. The plaintiffs called the following witnesses: Dr Eng Tay Meng ('PW1') of the Singapore General Hospital, the second plaintiff ('PW2'), LKL ('PW3'), Ng Hock Sun ('PW4') and NBK ('PW5'). PW1, PW2 and PW4 could not give any evidence relevant to the signing of the transfer, although PW4 testified that he visited his father in hospital frequently and regularly at various times and never once saw NYL there. PW1 also could say nothing about the mental condition of NYC as he was not the doctor in charge.

LKL testified that she was illiterate although she could sign her name. It was her practice to sign all documents presented to her for signing by NYL without consulting NYC as she was told that they concerned the affairs of the company. She admitted signing all the company documents produced by the defendant that had her signature on them. She admitted that she was aware of the contents of one resolution dated 4 March 1982 (DB53), appointing NYL and NBK as signatories to the company's bank account. She said that she was not made a signatory because she was illiterate.

During NYC's illness, she visited him in hospital every day between 6am and 7am and only returned home at night and that she was by her husband's bedside in the room all the time except when the doctors were there. She saw NYL a few times in hospital, but usually in the afternoon or evening. She remembered that on 25 March 1982, NYL approached her at the corridor of the ward outside NYC's room and asked her to sign a document. She said that there was no other signature on it and that the contents were not explained to her by NYL except that it had something to do with the company. She signed it as requested. This document (DB54) was a board resolution approving the sale of the shares by NYC to NYL for $50,000. After this episode, LKL signed another document dated 1 April 1982 (DB55) brought to her by NYL. DB55 was a board resolution authorizing the company's bank account be operated by two out of three signatories. DB55 was not signed by NYC even though he was still alive. No explanation for this omission was offered by any of the witnesses, except that NYL said NYC might have forgotten about it.

As regards the $50,000 allegedly paid in cash to NYC, LKL testified that it was not possible for such a large sum of money to have been paid to NYC in hospital without anyone knowing about it. The tenor of her evidence was that she had never seen the cash nor was she told about the sale of the shares by NYC at any time. She was surprised by the disclosure of the transfer as there was no reason for NYC to sell the shares.

NBK's testimony supported that of LKL in regard to how company documents came to be signed by the directors: they were usually brought by NYL. She could read English but she usually did not read the documents signed by her. She remembered signing DB53 on 4 March 1982 at the home of NYC who asked her to sign. She admitted having signed DB54 with LKL's signature on it at the office when NYL brought it to her but she claimed that she was not given an opportunity to read it. She also said that NAK, who could not read English, signed DB54 later at the office. NAK was asked to sign DB54 by NYL and she was also given no explanation. NAK was illiterate in English. NBK was not aware of the sale until the present action had been commenced. She said that she could not accept that NYC could have sold the shares to NYL as he had no reason to. NYL did not have a specific job in the company; he did not secure any contracts for the company; he only wrote up the accounts. But she agreed that NYC trusted NYL. She had no quarrel with NYL. She had quarrelled with LKL and was not on speaking terms with her for eight to nine years. They were only reconciled after NYC's death. That in essence was the case for the plaintiffs.

What was NYL's version of the crucial events that took place that resulted in his acquiring the shares? He confirmed his role as a go-between in respect of company documentation but said that NYC would never sign any document without understanding its contents. He said that NYC would occasionally discuss business affairs with him, and with no one else. As regards the procedure for signing resolutions, he said that after instructing Lee to draft the resolutions, he would bring them back to NYC

in the evenings for signature. He did not go around getting signatures. It was NYC who obtained the directors' signatures on the resolutions. NYC would not sign the resolutions until after the other directors had signed. NYL would sign in the presence of NYC. He denied bringing DB53 to NYC's house for the directors to sign and that he brought it to and signed it in the Singapore General Hospital.

NYL claimed that on the evening of 4 March 1982, NYC had telephoned and told him to come to the hospital the next day to see him at 7am, before LKL's arrival. He went at the appointed time. They were alone. He was asked by NYC to buy the shares, to carry on the business of the company and to look after NYC's family and to find the money to pay for the shares. He was told by NYC to get NYL's son to rejoin the company. NYL agreed to the price of $50,000 which he considered was not too high or too low; he did not bargain as NYC was his brother. After the meeting, NYL went to his friends to obtain a loan: one agreed to lend $30,000 and the other $20,000. He got the loan of $30,000 first and went to hospital on 8 March 1982 to see NYC. He paid the $30,000 in cash in denominations of $1,000 and $500 notes. After paying the money he left for work. No other conversation took place. He did not ask for a receipt and was not given one. On 15 March 1982, he paid over the remaining $20,000 in $1,000 notes. Again no receipt was asked or given. The next day, NYL went again to see NYC who told him to instruct Lee to comply with the procedure for the transfer of the shares. On 17 March, NYL went to see Lee and told him about the sale and the payment of $50,000 and instructed him to prepare the requisite documents. On 18 March, NYL went to Lee and collected DB54 and the transfer which he delivered to NYC in the afternoon. NYL said he would get the other directors to sign DB54. On or about 22 or 23 March, NYL went to hospital to collect DB54 and the transfer. He signed DB54 and the transfer followed by NYC. At the same time that these two documents were signed, NYC had also signed a transfer (P2) of his shares in another company called Tecon Construction Pte Ltd to NYL for a consideration of $6,501. NYL did not pay for these shares.

After these documents had been signed, NYL took them back to Lee who caused the transfer to be stamped and the new share certificate to be issued. The certificate for 50,000 shares was issued to NYL on 6 April 1982. The common seal of the company was affixed to the share certificate in the presence of NYL and Lee.

Under cross-examination, NYL claimed that he did not know that NYC was seriously ill until after his exploratory operation on 19 March 1982. He claimed that NYC had discussed the sale of the shares to him even before NYC was admitted to hospital, and that this happened in early February when NYC was not feeling well and had told him that if anything untoward happened to NYC, NYL were to assist, and for that purpose, the shares would be sold to him. NYL also refused to identify the persons who made him the loans on the ground that it would put them into trouble. He also said that he did not ask NYC for any receipts as he did not expect NYC to die and that being brothers it would be petty to ask for receipts. When asked why he did not ask a nurse to witness the execution of the transfer, he said that it was unnecessary as they were brothers. He also claimed that when NYC gave him instructions to prepare DB54, Ng Yew Leong was present; that he had not asked Ng Yew Leong to back up his evidence as he would never have sworn an affidavit to that effect. (For the record, Ng Yew Leong died on 11 July 1985.) NYL also claimed that, unlike the shares, NYC had given the Tecon shares to him free of charge as that company was not doing any business.

That in essence was the defence. In summarizing it, I have not referred to the testimony of Lee who was called for the defence. Lee did not know the true circumstances relating to the alleged sale of the shares. He only knew about the contents of DB54 through NYL. He claimed that the transfer and the transfer of the tecon shares were prepared by the same clerk at the same time, but explained that his firm had many typewriters when it was pointed out to him that the two documents were typed on different typewriters. I think that Lee knows far more about the alleged sale of the shares than he was prepared to tell the court.

Counsel for NYL submitted that on the evidence the plaintiffs had not discharged the burden of proving that NYL had acquired the shares without NYC's knowledge or acquired them fraudulently or as a constructive or resulting trustee. He submitted that NYC was an astute man who knew what he was doing all the time. He made use of the shareholders to minimize his own tax liability and that of the company. He was in absolute control of the affairs of the company and he kept his own counsel in everything and that the only person he would discuss business affairs with was NYL. It was to be expected that he would not tell LKL or NBK about the sale of the shares. NYL was the logical choice to take the place of NYC to carry on the business of the company. The evidence adduced on behalf of the plaintiffs was entirely negative and no inference could be drawn therefrom that NYC did not of his own volition sell the shares or did not receive the $50,000.

Counsel for the plaintiffs submitted that his clients' case was very simple. NYC was in hospital suffering from a terminal disease when he was alleged to have voluntarily sold his controlling shares in the company to his elder brother, NYL, in circumstances of secrecy and at a price which was well below their value and for which there was no evidence of payment by NYL. Furthermore, it was not

disputed that NYC had all the time been relying on NYL to give instructions for the preparation of documents in English relating to the affairs of the company, the contents of which had to be interpreted to him by NYL; to that extent, NYC was dependent exclusively or to a very large degree on NYL. It was therefore easy for NYL to obtain NYC's signature to any document in English, particularly in the circumstances obtaining as NYC was in no position to manage the company. The alleged sale was not known or made known to the members of NYC's family until after NYC's death; although DB54 was signed by LKL, NBK and NAK, they were not aware of the contents thereof and had merely thought it was another company document. NYL was unable to substantiate his allegation that he had paid $50,000 in cash in hospital to NYC for the shares as no one has seen the cash. Moreover, NYL claimed to have borrowed the cash but was unable to name the lenders. Finally, when the company was asked to supply particulars of NYC's shareholdings for the purpose of estate duty, NYL prevaricated and replied after a long delay through his solicitors.

Counsel for the plaintiffs also submitted that on these facts, the court should draw the inference that NYL had acquired the shares fraudulently or without the knowledge of the plaintiffs. He also submitted that NYL did not acquire the shares in good faith and that by virtue of s 113 of the Evidence Act (Cap 97, 1985 Ed), NYL has the burden of proving the good faith of the transaction. Section 113 provides as follows:

> Where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence.

I will consider first the burden of proof in relation to s 113 of the Evidence Act (Cap 97, 1985 Ed). The general rule, of course, is that he who asserts must prove. However, s 113 of the Evidence Act (Cap 97, 1985 Ed) reverses this burden where one party is in a position of active confidence to the other. This section is nothing more than a restatement of the principle in equity which, in the words of Lord Kingsdown in *Smith* v *Kay*[1] at p 779: '... applies to every case where influence is acquired and abused, where confidence is reposed and betrayed.' In such cases, equity presumes undue influence until the contrary is proved. There are certain personal relationships which equity regards as giving rise to the presumption of undue influence, because one party is deemed to be in a position of dominance vis-a-vis the other, eg parent and child, trustee and beneficiary, doctor and patient etc.

Equity does not presume that a brother is in a confidential position to and therefore has undue influence over another sibling, not even an elder brother to a younger brother. But such a position may exist as a fact in a particular relationship. On the evidence before me, I am unable to find that NYL was in a position of active confidence vis-a-vis NYC even though NYC was hospitalized with a terminal illness and continued to rely on NYL to implement his decisions concerning the management of the company. I find that despite his illness, NYC was able to exercise his judgment independently. He gave instructions for the making of his will and he made his will. I do not think that NYC's will was overborne by NYL in the alleged sale of the shares. I do not believe that NYL could have influenced NYC in selling the shares to him at the price of $50,000 or at any other price, if NYC had known that he was being asked to do the same. Accordingly, I hold that s 113 of the Evidence Act (Cap 97, 1985 Ed) does not apply to the facts of this case, and the burden of proof remained throughout the case with the plaintiffs.

I will now consider the burden of proof in relation to the causes of action as pleaded. The allegation of forgery has been withdrawn not, I must say, because the plaintiffs have affirmed the genuineness of the signatures of NYC on the transfer but simply because they have not been able to obtain expert evidence to confirm the allegation of forgery. To that extent, the plaintiffs have not discharged the burden of proving that allegation. I also agree with counsel for NYL that the plaintiffs have not proved that NYC was, during his illness, generally incapable of consenting to any transaction of a legal nature up to the time of the alleged sale of the shares.

However, it does not follow from NYC being compos mentis that whatever document he had signed or alleged to have signed would necessarily have reflected a conscious or knowledgeable state of mind when he signed it so as to make the document valid in the eyes of the law. In respect of the alleged sale of the shares, he might have been misled as to the nature of the document he was being asked to sign. This is in effect the thrust of the last cause of action, viz that notwithstanding NYC's signature on DB54 and the transfer, he might not have known what these documents were. This is the familiar plea of non est factum, although the plaintiffs' pleadings do not use this expression. We are here not talking about NYC's mental capacity generally but his specific knowledge and intent when he signed DB54 and the transfer.

If NYC had been alive and had commenced proceedings to set aside the transfer of the shares on the ground of non est factum in respect of the transfer, he would have to prove that he did know what sort of document he was signing, assuming that he accepted that the signatures on the transfer were his.

I do not think that this burden is shifted to NYL by reason merely of NYC's death. His personal representatives must be subject to the same obligation. However, in order to discharge it, the plaintiffs do not have to prove more than that on the evidence before the court it was more improbable than otherwise that NYC could not have

agreed to sell the shares to NYL at all or at the alleged price. Any evidence that renders the existence of the negative probable is sufficient.

In the present case, I am wholly satisfied that on the evidence before me, the plaintiffs have discharged the burden of proving that there was never a sale of the shares to NYL, notwithstanding that they have nothing positive to say about NYC's signatures on the transfer. I accept the submissions of counsel for the plaintiffs which I have summarized above. I have no doubt whatever that the widow was not aware of the transfer of the shares and that she did not see or receive any part of the $50,000 cash alleged to have been paid to NYC. There was no evidence that she could have known of the transfer of the shares prior to the death of NYC except through her signature in DB54, a document she could not read and which I find to have been signed by her without knowledge of the contents at the request of NYL at the corridor of the hospital room. I also agree that it was highly improbable that such a large sum of money could have been paid to NYC in hospital without any of the hospital staff knowing about it.

I also believe LKL's evidence that NYC had said nothing to her about the sale of the shares whilst he was in hospital and after his discharge. If he had, I would have no doubt that it would have been talked about amongst the members of the company and that NYL would have heard of such talk. Yet, on the evidence, it would appear that until long after the death of NYC things went on as if nothing had happened. It was as if NYC himself did not know that he no longer owned the shares after he had been discharged from hospital. Of course, it may be argued that NYC's silence would be consistent with the way NYC went about selling the shares to him; he wanted to do it secretly. As against that, it could be said that would only be so if indeed NYC had agreed to sell the shares whether in secret or otherwise.

Having carefully considered the testimonies of the parties and witnesses, I do not believe that NYC had agreed to sell the shares to NYL at $50,000 or at any price. The primary reason is that I do not believe the evidence of NYL for the following reasons. First, there was no reason for NYC to sell the shares to any person, certainly not at $50,000. He was not in financial need nor was his family. NYC must have known, before he went into hospital, of the volume of the business already in hand and therefore the worth of the shares. A person of his character would not, in my judgment, sell the shares at par value unless he really wanted to do NYL a great favour and at the same time disinheriting his family of the only substantial asset he had. No satisfactory reason has been suggested why NYC suddenly acted so generously towards NYL at this time of his life and so callously towards his own family. NYL said NYC wanted him to carry on the business and look after the business and to pay a salary to the widow. I find this highly improbable as NYC must have known that NYL knew nothing about the plumbing and sanitary works business and was in no position to run the business properly. The person who knew the business was Ng Yew Leong and there was no evidence that NYC knew that Ng Yew Leong would also die a few years later. If NYC had wanted his family to be looked after, there was no reason to deprive them of the benefit of his main asset, the shares. I therefore do not believe NYL's allegation that NYC decided to sell the shares to him so that NYL could keep the company going.

The second reason I do not believe NYL's evidence is that there was no conceivable reason for NYC to sell the shares in such a clandestine manner. NYC was a conservative Chinese businessman who never bothered to discuss his business matters with his family. Throughout the years, he exercised absolute control over his family and his business. The only plausible reason for him not to disclose the sale to his family would have been that he did not want them to raise any objections to it. But, the relationship between NYC and his family was such that it was not expected that any objection would or could be raised by them against whatever NYC decided to do. Furthermore, I do not think that would have been a consideration, assuming that LKL or the children were in a position to raise any objection, that would have bothered NYC had he decided to sell the shares.

The third reason for my disbelieving NYL's evidence is that I do not think that NYC could have, as alleged by NYL, told NYL to leave DB54 with him so that he could obtain the signatures of the other directors on it. I find this highly improbable as NYC was seriously ill and in drips all the time and it would have been very much simpler, and consistent with past practice, for NYL to have DB54 signed which was in fact what was alleged by LKL and NBK.

The fourth reason for disbelieving NYL was his trusting act in handing over $50,000 in cash to NYC without any receipt or any other document to evidence a sale of the shares to him. That was a large sum of money for NYL which he did not have and which he alleged he had to borrow. He must have considered the consequences if NYC had gone into a coma or had died before executing the transfer. I do not believe NYL's reasons for not asking for a receipt. I think that he did not ask for receipts because there was no occasion to ask for them.

I also find as a fact that NYL did not pay $50,000 to NYC as alleged by him, because he did not borrow the said sum of money. Given his financial resources and his circumstances throughout his life, it was inherently improbable that he could have got a loan of $30,000 cash from a friend a few days following the secret offer to sell the shares to him and another loan of $20,000 from another friend he refused to identify. If they existed, it

would be the easiest thing in the world to name them. There was nothing illegal about these loans, unless NYL knows something about them or the conditions affecting them which he did not want the court to know of. Who would grant him these substantial loans without some form of written acknowledgment or security? No document was produced to substantiate these loans. One would have expected NYL to have offered to pledge the shares as security for these loans.

It should also be recalled that NYL alleged that NYC asked for payment first before instructing Lee to draw up the documents. Why NYC would want to do something like that has also not been explained. In view of NYC's character, I find his behaviour, if true, aberrant or irrational. But I do not believe this to be the truth. All the credible evidence showed that there could not have been a sale even though the plaintiffs have not been able to explain how the signature of NYC got onto DB54 and the transfer. Save for that omission which, in my view, should be considered merely as an inability to produce the necessary evidence to prove forgery, all the other evidence was consistent with a situation where NYL, with full knowledge of the financial and business condition of the company, decided to take steps to obtain a transfer of the shares, when he realized that NYC was dying. He was in a position to do that because apart from NBK, no one would be able to read any of the documents that NYC or the other directors would be asked to sign so long as they were told that they concerned the company. In my view, NYL's intention to acquire NYC's shares by stealth is consistent with the manner in which the acquisition was carried out. DB54, the transfer and the new share certificate were prepared and executed on the quiet and only NYL and Lee were aware of their significance. On the evidence as a whole, it is my view that the probability of NYC not knowing the nature of the document he was signing, viz the transfer, is much higher than the probability of his having been aware of it.

It is necessary to bear in mind that the case for NYL is not merely that there was a sale but that he had paid for the shares in cash. His case is not that there was a sale but that he had not paid for the shares. These two strands in his case are intertwined and cannot be separated. They hold or break together. If I do not believe one part of the story, I am well entitled to conclude that the other part is also false. On the evidence, I have no doubt that NYL never paid for the shares for the reasons I have already given. Accordingly, I also find as a fact that there was never any sale of the shares by NYC to the knowledge of NYC.

For the above reasons, the plaintiffs succeed in their claim. There will be a declaration that the shares are held by NYL for the estate of NYC by way of resulting or constructive trust and an order that (1) the proceeds of realization of the shares be paid to the plaintiffs; and (2) that the first defendant account to the plaintiffs all profits which he has derived from the wrongful ownership of the shares. The first defendant will pay the costs of the plaintiffs in this action.

Plaintiffs' claim allowed.

Solicitors: *G Murugaiyan; Tan Rajah & Cheah; PC Tock & Co; Goh Soon Hock & Co.*

Reported by *Terence Tan Bian Chye*

Arif v Yeo & Anor

HIGH COURT (SINGAPORE) — SUIT NO 1199 OF 1985
COOMARASWAMY J
25 AUGUST 1989

Partnership — Allegations of mismanagement — Issue of which partner should run partnership pending trial — Interim order — Dissolution of partnership — Effective date of dissolution — Whether date of service or date of filing — Civil Law Act (Cap 43, 1985 Ed), s 5(1) — Partnership Act 1890 [UK], s 32(c) — Partnership Act 1908 [NZ], s 35

Civil Procedure — Interim orders — Issue of which partner should run business pending trial — Undertaking of damages by one partner — No evidence of inability to honour undertaking — Damage to partner if not allowed to run business — Damages not an adequate remedy

This action concerned a partnership. The original partners were the plaintiff and two persons other than the two defendants. The other two withdrew from the firm at different times and the first defendant came in as a partner with the plaintiff. However, she made no effort to have her name recorded with the landlord as a co-tenant or a joint tenant. Her brother, the second defendant, was not a partner but was the alleged 'financier' of the business providing capital for two major aspects of the firm's business. The second defendant went to the shop and forced the plaintiff to move out, alleging his mismanagement of the partnership business. Each in effect applied to keep the other side out of the shop and for the running of the business there to be given to it.

Held, granting the plaintiff's application to continue operating the partnership business from the partnership premises until trial:

(1) It is plain that until the second defendant ordered the plaintiff out of the shop, he (the plaintiff) was constituted the managing partner with the consent of the first defendant, and so far as it matters, of the second defendant.

(2) As regards their rights inter se, it is clear that where, however, the partner complained of has by agreement been constituted the active managing partner, the court will not interfere unless a strong case is made against him.

(3) On the affidavit evidence, the defendants' allegations of mismanagement have, on the evidence before the court, been fully answered; and they do not justify the second defendant's actions in expelling the plaintiff from the shop nor the intervention of the court.